BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON L. PRIDE Claimant	)	
VS.	)	
4-WAY CAFÉ Respondent	)	Docket No. 245,898
AND	)	
FARM BUREAU MUTUAL INS. CO. Insurance Carrier	)	

ORDER

Claimant requested review of the February 16, 2007 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on May 23, 2007.

APPEARANCES

Richard Billings of Topeka, Kansas, appeared for the claimant. Leigh C. Hudson of Fort Scott, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered accidental injury on September 14, 1998, when she slipped and fell at work. Initially, claimant alleged injuries to her back, legs, hips and neck. She later alleged she also developed a permanent psychological impairment as a result of the accident. Claimant sought compensation for a 100 percent work disability.

The Administrative Law Judge (ALJ) found claimant was only entitled to a 5 percent functional impairment. The ALJ determined claimant had not met her burden of proof to establish she suffered a permanent psychological impairment as a result of her work-

related accident. The ALJ further determined claimant did not make a good faith effort to find appropriate post-injury employment. Consequently, the ALJ imputed a wage which was 90 percent or more of claimant's pre-injury average gross weekly wage which limited claimant's compensation to her functional impairment.[1]

The claimant requests review of the nature and extent of disability. Claimant argues that as a result of her physical and psychological impairments she suffers a 100 percent work disability.

The respondent requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was the manager of the 4-Way Café and her job duties included cooking, planning buffets, cleaning, arranging schedules and hiring employees. On September 14, 1998, claimant went through the kitchen door, slipped on the recently mopped floor and fell. She injured her upper body including her shoulders, arms and mid back. Claimant was provided medical treatment for her cervical complaints consisting of medications and physical therapy. After the accident the claimant never returned to work for respondent as that business closed.

In January 1999 claimant obtained employment as a motel manager in Dodge City, Kansas. She worked there for approximately seven months at a higher rate of pay than she received from respondent. Claimant testified she had to quit that job because her legs were swelling. And she complained that her low back, legs, shoulders, and upper back were all painful. Claimant further testified that as her chronic pain increased she began to experience depression and anxiety which gradually worsened. Claimant began treatment with a mental health therapist. Claimant is on Social Security disability but testified that through an SRS program she is trying to return to work.

Dr. Vito J. Carabetta, board certified in physical medicine and rehabilitation, evaluated claimant on March 14, 1999. Claimant's chief complaint was bilateral pain in the

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[1] See K.S.A. 44-510e(a) and *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997). But see *Graham v. Dokter,* ___Kan. ____, _____P.3d. ____, (No. 95,650 filed July 13, 2007); *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

upper trapezius muscle region which continued into the cervical area. Dr. Carabetta diagnosed claimant with fibromyositis affecting the upper trapezius muscle region bilaterally. The doctor explained that meant the muscles had been sprained. The doctor recommended claimant continue with medications and additional physical therapy.

On April 13, 1999, x-rays of claimant's cervical spine were unremarkable and Dr. Carabetta concluded claimant was at maximum medical improvement. On April 26, 1999, Dr. Carabetta rated the claimant using the AMA *Guides*[2] and based upon the DRE Cervicothoracic Category II opined claimant suffered a 5 percent permanent partial functional impairment. Dr. Carabetta imposed restrictions that claimant avoid overhead activity and awkward head and neck posturing. Dr. Carabetta reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston and concluded claimant could no longer perform 2 of the 28 non-duplicative tasks for a 7 percent task loss.

At the request of claimant's attorney, Dr. Douglas Rope examined claimant on July 29, 1999, for a permanent partial impairment evaluation. Claimant complained of paracervical and trapezius discomfort with tingling and parathesias into the fingers of her right hand. Dr. Rope diagnosed claimant with chronic post-traumatic cervical strain with some secondary myofascial discomfort. Dr. Rope rated the claimant using the AMA *Guides* and based upon the DRE Cervicothoracic Category II opined claimant suffered a 5 percent permanent partial functional impairment. Dr. Rope reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston and concluded claimant could no longer perform 11 of the 28 non-duplicative tasks for a 39 percent task loss.

At the request of claimant's attorney, Dr. Douglas Rope again examined claimant on July 8, 2005, for a permanent partial impairment evaluation. It appears that when Dr. Rope examined claimant the second time he did not remember he had provided claimant an impairment rating back in July 1999 for this same accidental injury. After the second examination Dr. Rope diagnosed claimant with chronic paracervical and thoracic discomfort as well as chronic right hip and low back discomfort. Based upon the AMA *Guides*, Dr. Rope rated claimant for her cervical and thoracic condition with an 8 percent permanent partial functional impairment. The doctor additionally concluded claimant had a 10 percent impairment attributable to her low back and hip but he attributed one-third of that to claimant's pre-existing condition before the September 14, 1998 accident. The doctor combined the ratings for an 11.3 percent whole person functional impairment.

On cross-examination Dr. Rope agreed that when he examined claimant in 1999 she did not make any complaints of hip pain. And his report of that examination makes no mention of low back pain. And Dr. Rope agreed the contemporaneous medical records of Dr. MacMillan in 1998 after the accident did not contain any complaints of low back or

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

hip pain. Dr. Rope further agreed that if claimant had low back and hip problems related to the September 1998 accident he would have expected such complaints by March of 1999 when claimant was examined by Dr. Carabetta.

Respondent's attorney hired vocational expert Karen Crist Terrill to evaluate claimant. Ms. Terrill met with claimant in 1999 and again in July 2006. Ms. Terrill opined that claimant was capable of earing a wage comparable to her pre-injury average gross weekly wage. Ms. Terrill opined claimant was capable of earning at least $7.50 an hour. Moreover, Ms. Terrill opined that if claimant was making a good faith effort to obtain employment she should be able to obtain a job within her capabilities that would pay her a comparable wage.

Bud Langston was asked by claimant's attorney to perform a vocational evaluation of claimant. In his report dated October 27, 1999, he identified 28 tasks claimant performed in the 15 years before her injury. Mr. Langston opined that the combination of claimant's psychological problems, her physical problems and her lack of education would prevent claimant from engaging in substantial gainful employment. But if Dr. Carabetta's restrictions were used then claimant would be employable and could earn up to $7 an hour.

At the request of claimant's attorney, Dr. Jeanne Frieman, a psychologist, examined the claimant on August 12, 1999, and on May 5, 2006. On the first occasion Dr. Frieman concluded the claimant was depressed with some anxiety as well as organic brain syndrome with problems of declining memory. At the second examination the claimant had depression, anxiety disorder with panic attacks and organic brain syndrome. Using the AMA *Guides*, Dr. Frieman concluded claimant had a 25 percent permanent partial impairment. Dr. Frieman opined that claimant would be unable to engage in full-time employment. And Dr. Frieman noted that claimant's psychological condition worsened after the work-related injury.

At the request of respondent's attorney, Dr. Patrick Caffrey, a psychologist, conducted a psychological evaluation of claimant on June 1, 2006. Dr. Caffrey performed a diagnostic interview with claimant and administered a series of psychological tests. He also reviewed claimant's medical records and Dr. Frieman's reports. Dr. Caffrey noted that his testing revealed claimant was malingering or faking bad as it pertains to memory function. Dr. Caffrey also concluded claimant did not have organic brain dysfunction. Dr. Caffrey opined claimant would be capable of full-time employment in the open labor market. Moreover, Dr. Caffrey concluded claimant did not have a ratable psychological impairment.

The ALJ ordered Dr. James Eyman, a psychologist, to perform an independent psychological evaluation of claimant. Dr. Eyman met with claimant on six separate dates. Dr. Eyman noted claimant did not put forth maximum effort on the test of memory malingering and determined that she was most likely falsely attempting to portray herself as having a significant memory problem. Dr. Eyman noted claimant did not hit her head

in her fall at work so there was nothing about her injury that would result in memory impairment and her test scores indicate claimant is malingering by falsely portraying herself as having a memory problem. Dr. Eyman diagnosed claimant with depressive disorder and anxiety disorder, nonetheless, he determined claimant's psychological symptoms did not appear to be the result of her work-related accident in 1999. In his report filed with the Division of Workers Compensation on February 1, 2007, Dr. Eyman noted in pertinent part:

> Although Ms. Pride suffers from depression and anxiety, her psychological symptoms do not appear to be the result of her work related accident in 1999. Her assertion that the injury and resultant pain are causing her depression and anxiety is not entirely consistent with the clinical data. Similarly, her insistence that her work injury has caused a memory problem does not fit the clinical picture and the type of injury.
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> The information from the mental health center intake note of September 5, 2001 indicates "no mental health symptoms until fairly recently, and she began experiencing anxiety and depression, both of which she states are related to her ongoing physical pain." It does not make clinical sense that after being injured for three years, she would begin to develop anxiety and depression. It is more likely that, if her pain and limitations were causing psychological symptoms, the anxiety and depression would have begun much sooner. The content of her first psychotherapy session on September 19, 2001 also does not match with her anxiety and depression being generated from "ongoing physical pain". The psychotherapy note indicates that the session focused on Ms. Pride's concern that her son might volunteer for the Army, financial problems, a recent car accident, and her being arrested in Coffey County two days before. There was no mention of physical pain or her work injury causing any limitations.

Finally, Dr. Eyman noted claimant's depression and anxiety does not prevent her from working.

What is the extent of claimant's permanent functional impairment?

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[3]

After Dr. Carabetta determined claimant was at maximum medical improvement he rated her on April 26, 1999 with a 5 percent permanent partial functional impairment. On July 29, 1999, Dr. Rope also rated claimant with a 5 percent permanent partial functional impairment. Dr. Rope saw claimant again in July 2005 and amended his impairment rating to 11.3 percent which added ratings for claimant's low back and hip. But claimant never

[3] K.S.A. 1999 Supp. 44-510e(a).

complained of pain in her low back and hip when she was receiving treatment or when initially examined for rating purposes by Drs. Rope and Carabetta. The ALJ analyzed the evidence in the following manner:

> The court finds both doctor's initial ratings of 5 percent to the body as a whole to be more credible. Dr. Rope added the low back and hip despite the fact claimant did not complain about those areas of her body during the initial rating.

The Board agrees and affirms.

Traumatic neurosis is compensable in workers compensation litigation when the psychological injury is directly traceable to a compensable physical injury.[4] A covered industrial accident, which aggravates, accelerates or intensifies a psychological disorder, will result in workers compensation benefits being allowed for the aggravated psychological problems.[5] Although Dr. Frieman concluded claimant's depression and anxiety was related to her work-related accident, both Drs. Caffrey and Eyman not only concluded claimant was malingering on aspects of her psychological testing but also determined she did not have a ratable psychological impairment. Dr. Eyman, the court appointed examiner, concluded claimant's psychological conditions were not related to the September 14, 1998 accidental injury. In this instance, the Board finds the more persuasive evidence does not support claimant's contention that her psychological problems are the result of her work-related injuries. The Board, therefore, affirms the ALJ's determination that claimant has failed to prove a psychological impairment related to her September 14, 1998 accidental injury.

What is the nature and extent of claimant's disability?

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A.1999 Supp. 44-510d, her entitlement to permanent disability benefits is governed by K.S.A. 1999 Supp. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning

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[4] *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996).

[5] *Boutwell v. Domino's Pizza*, 25 Kan. App. 110, 959 P.2d 469 (1998).

> after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[8]

The Kansas Court of Appeals in *Watson*[9] more recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id.* at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

> determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

The Kansas Court of Appeals in *Watson*[11] more recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[12]

But even more recently, in *Graham*[13], the Kansas Supreme Court said:

> When a statute is plain and unambiguous, we must give effect to its express language, rather than determine what the law should or should not be. We will not speculate on legislative intent and will not read the statue to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction. *Steffes v. City of Lawrence*, 284 Kan. ___, Syl. 2, ___ P.3d ___(No. 96,838, filed June 22, 2007); *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, 809, 132 P.3d 1279 (2006).
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> The Court of Appeals erred in overlooking the import of this plain language in the statue, instead attempting to divine legislative intent from a review of legislative history. See *Graham I*, 36 Kan. App. 2d at 525. In our view, that step is unnecessary. Statutory interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well. See *Perry*, 281 Kan. at 809.
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> The panel began its discussion by equating the statute's use of the phrase "engaging in work" to "able to earn." K.S.A. 44-510e(a) prohibits permanent partial general disability

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[10] *Id.* at Syl. ¶ 4.

[11] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[12] *Id.* at Syl. ¶ 4.

[13] *Graham v. Dokter,* ___Kan. ____, _____P.3d. ____, (No. 95,650 filed July 13, 2007).

> compensation if an employee is "engaging in work" for wages equal to 90 percent or more of the average preinjury wage. The panel said the record was insufficient to support claimant's contention that he was "unable to earn" that amount. We see a distinction with impact between the actual "engaging in work" of the statue and the theoretical "able to earn" of the Court of Appeals. Claimant may be theoretically able to earn more, but substantial evidence supports the Board's determination that his actual pain prevents the theory from becoming a reality.
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> The panel also advanced a policy rationale for its decision--its desire to avoid manipulation of a system that permitted a work disability award "based purely on reported pain." *Graham I,* 36 Kan. App.2d at 527. It wanted to avoid a situation where a worker could control "his or her workweek to assure that, *on average*, the postinjury weekly wage will not exceed the 90 percent of preinjury wage that would make the worker ineligible for the award, even through [sic] the worker demonstrates a clear ability to earn the 90 percent any time desired." 36 Kan. App. 2d at 527. There are at least three reasons why this rationale was inappropriate. First, public policy is usually the arena of the legislative branch. Second, even if the judiciary was charged with setting public policy, other mechanisms exist for detection of fraudulent workers compensation claims. See K.S.A. 2006 Supp. 44-501; K.S.A. 44-510e(a); K.S.A. 2006 Supp. 44-551; *Lowmaster v. Modine Mfg. Co*., 25 Kan. App. 2d 215, 219, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998). And, third, there is absolutely no evidence in the record that this particular claimant was "faking his pain or lack of ability to work full time."

In *Graham*, the Supreme Court also said that there was no evidence Graham was attempting to manipulate the workers compensation system. Thus, the Supreme Court did not reach the issue of whether the literal language of K.S.A. 44-510e(a) would be applied to allow an award of a work disability under those facts. Nevertheless, the *Graham* case may signal a willingness on the part of the Supreme Court to revisit those cases where the judiciary decided public policy required the court to depart from the plain language in the statute. The Board, therefore, will continue to follow the *Foulk* and *Copeland* line of cases until an appellant court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find appropriate employment postinjury.

In January 1999 claimant obtained employment as a manager at a motel and worked for approximately seven months. Her gross average weekly wage was more than what she had earned working for respondent. She then quit that job because of pain complaints in her legs, low back, hips as well as her shoulders and neck. But she said she did not have any accidental injuries while working at the motel. She has not worked since then and had only applied for work at two businesses. Drs. Carabetta and Rope did not impose restrictions that would prevent claimant from working. And as previously noted, Drs. Caffrey and Eyman both agreed that claimant's psychological condition would not prevent her from engaging in substantial and gainful employment.

The Board concludes claimant has failed to prove that she made a good faith effort to find appropriate employment after terminating her job at the motel. The medical evidence is overwhelming that claimant's cervicothoracic injury does not prevent her from working. In short, claimant retained the ability to work but did not seek employment other than the minimal effort to apply at two businesses and alleged participation in a State of Kansas vocational assistance program that did not result in any work placement. Consequently, a post-injury wage should be imputed.

After her work-related accident, the claimant obtained employment as a manager of a motel and was paid an average gross weekly wage greater than her pre-injury wage working for respondent. Karen Terrill testified claimant had the ability to earn at least $7.50 an hour and Bud Langston agreed that if Dr. Carabetta's restrictions were utilized then claimant retained the ability to earn $7 an hour. Either figure would result in an imputed wage equal to or greater than 90 percent of claimant's pre-injury gross average weekly wage. The ALJ determined claimant retains the ability to earn $7.50 an hour for a 40-hour work week and imputed an average gross weekly wage of $300. The Board agrees and affirms. As the imputed wage equals claimant's pre-injury wage, pursuant to K.S.A. 1999 Supp. 44-510e(a) her compensation is limited to her 5 percent functional impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 16, 2007, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of July 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Richard Billings, Attorney for Claimant
Leigh C. Hudson, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge